

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUVENIO ZUNIGA,

Claimant,

vs.

SMITHFIELD FOODS, INC.,

Employer,

and

SAFETY NATIONAL CAS. CORP.,

Insurance Carrier,
Defendants.

File No. 1660515.01

A P P E A L

D E C I S I O N

Head Notes: 1402.40;1803; 1803.1; 2204;
2502; 2907; 3002;

Defendants Smithfield Foods, Inc., employer, and its insurer, Safety National Casualty Corporation, appeal from an arbitration decision filed on January 24, 2022. Claimant Juvenio Zuniga cross-appeals. The case was heard on April 6, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 10, 2021.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish he is married and entitled to two exemptions, and the deputy commissioner found claimant's weekly benefit rate is \$626.67. The deputy commissioner found claimant sustained permanent sequela injuries to his left shoulder and his mental health caused by the stipulated March 18, 2018, work injury to claimant's right shoulder. The deputy commissioner found claimant is not entitled to recover permanent partial disability (PPD) benefits for his mental health condition. The deputy commissioner found claimant sustained 12 percent right upper extremity impairment, which entitles claimant to receive 48 weeks of PPD benefits under Iowa Code section 85.34(2)(n). The deputy commissioner found claimant sustained three percent left upper extremity impairment which entitles claimant to receive 12 weeks of PPD benefits under Iowa Code section 85.34(2)(n). The deputy commissioner found the commencement date for PPD benefits is December 19, 2019. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement from defendants in the amount of \$2,672.00 for the cost of the independent medical evaluation (IME) of claimant performed by Sunil Bansal, M.D. The deputy commissioner found that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendants in the amount of \$1,293.00 for the cost of the

evaluation and the report of Catalina Ressler, Ph.D., and for additional costs totaling \$2,690.50.

On appeal, defendants assert the deputy commissioner erred in finding claimant is a credible witness. Defendants assert the deputy commissioner erred in finding claimant proved he was married at the time of the work injury. Defendants assert the deputy commissioner erred in finding claimant sustained permanent sequela injuries to his left shoulder and his mental health caused by the stipulated right shoulder injury. Defendants assert the deputy commissioner erred in finding claimant is entitled to receive 48 weeks of PPD benefits for his right shoulder injury, and 12 weeks of PPD benefits for his left shoulder injury. Defendants assert the deputy commissioner erred in finding the commencement date for PPD benefits is December 19, 2019. Defendants assert the deputy commissioner erred in ordering defendants to reimburse claimant for his costs.

On cross-appeal, claimant asserts the deputy commissioner erred in finding claimant is not entitled to PPD benefits for his mental health condition. Claimant asserts the deputy commissioner erred in finding the commencement date for PPD benefits is December 19, 2019. Claimant asserts the remainder of the decision should be affirmed.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, with my additional and substituted analysis, the arbitration decision filed on January 24, 2022, is affirmed in part, modified in part, and reversed in part.

Some of the findings by the deputy commissioner in the arbitration decision were based on the deputy commissioner's findings regarding claimant's credibility. The deputy commissioner found claimant was a credible witness. Defendants assert claimant was not credible. I find the deputy commissioner correctly assessed claimant's credibility. While I performed a de novo review on appeal, I give considerable deference to findings of fact which are impacted by the credibility findings, expressly or impliedly made, regarding claimant by the deputy commissioner who presided at the arbitration hearing. I find nothing in the record in this matter which would cause me to reverse the deputy commissioner's findings regarding claimant's credibility.

Without additional analysis, I affirm the deputy commissioner's findings that claimant was married at the time of the work injury and that claimant's weekly benefit rate is \$626.67. I affirm the deputy commissioner's finding that claimant sustained sequela injuries to his left shoulder and his mental health caused by the stipulated right shoulder injury. I affirm the deputy commissioner's finding that claimant sustained permanent impairments of his right and left shoulders caused by the work injury.

With my additional and substituted analysis, I reverse the deputy commissioner's finding that claimant proved his mental health sequela injury is permanent. I reverse the deputy commissioner's finding that claimant's right shoulder and sequela left shoulder injuries should be compensated as two separate shoulder injuries under Iowa Code section 85.34(2)(n), and I reverse the award of 48 weeks of PPD benefits for claimant's right shoulder, and the award of 12 weeks of PPD benefits for his left shoulder. I reverse the deputy commissioner's finding that the commencement date for PPD benefits is December 19, 2019. I reverse and modify the deputy commissioner's award of costs.

I. Permanency of the Mental Health Impairment

The deputy commissioner found claimant sustained a permanent mental health sequela caused by the work injury but declined to award PPD benefit for that condition. On appeal, defendants assert the deputy commissioner erred in finding claimant sustained a permanent mental health sequela. On cross-appeal, claimant asserts the deputy commissioner erred in finding he was not entitled to PPD benefits for his mental health condition.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Cihra, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

. . . it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

Defendants allege claimant failed to establish he sustained a permanent mental health sequela as a result of the stipulated right shoulder injury.

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-845 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers’ compensation that “if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-360, 154 N.W.2d 128, 132 (1967).

Two psychologists provided opinions on claimant’s alleged mental health condition, Robert Arias, Ph.D., and Dr. Ressler. Dr. Arias opined claimant did not sustain a mental health impairment caused by the work injury. (Ex. C) Dr. Ressler opined claimant sustained a mental health impairment caused by the work injury and she assigned a permanent impairment rating using disability criteria adopted by the Veterans Administration. (Ex. 3) Dr. Bansal opined he agreed with Dr. Ressler’s opinion without providing any analysis. (Ex. 2, p. 54) As noted above, without further analysis, I affirmed the deputy commissioner’s finding claimant sustained a mental health sequela caused by the stipulated right shoulder injury. With the following substituted analysis, I reverse the deputy commissioner’s finding claimant proved his mental health condition is permanent.

Dr. Ressler performed an independent mental health evaluation of claimant on November 6, 2020, and Dr. Ressler issued her report on November 20, 2020. (Ex. 3) Dr. Ressler diagnosed claimant with persistent depressive disorder, with anxious distress. (Ex. 3, p. 66) When asked for her opinion on whether the condition is permanent, Dr. Ressler opined:

If Mr. Zuniga's physical symptoms and experience of chronic pain does not improve, or if he begins to have significant difficulties with his left arm, it is very likely that his diagnosis of depression will be permanent in nature. Moreover, because of his low level of educational attainment as well as (what appears to be) low average intellectual capacity, combined with lack of psychological sophistication, Mr. Zuniga is not likely to be very responsive to traditional psychotherapy treatments. Unfortunately, this means that he has a poor prognosis, and his relief may only come from adequately managing his medication regimen and compliance.

Given the combination of factors described above, I conclude that this is likely a permanent impairment. Using the *Guides to the Evaluation of Permanent Impairment*, I would rate Mr. Zuniga's to be in Class 2 – Mild Impairment (Impairment levels are compatible with most useful functioning). Mr. Zuniga is demonstrating most impairment in his social functioning, activities of daily living, and concentration tasks. Comparably, using the VA Disability Ratings for Mental Health Disorders, I would offer a 30% rating since Mr. Zuniga does need his medication regiment in order to function; he is also experiencing frequent drops in mood; is often anxious or stressed; has difficulty sleeping; and has become suspicious (primarily of those whom he works for). Moreover, Mr. Zuniga is having trouble occasionally fulfilling his job requirements because of depression or pain; and he is struggling to maintain social connections outside of those he has with close family members.

(Ex. 3, p. 68)

I find Dr. Ressler's opinion on permanency is equivocal. She opined if his physical symptoms and chronic pain do not improve, or if he begins to develop significant difficulties with his left arm "it is very likely that his diagnosis of depression will be permanent in nature." She did not opine the condition is permanent at the time of her evaluation, rather permanency is noted in relation to future events that may or may not occur. Later in her opinion Dr. Ressler opined the condition is "likely" permanent; she did not opine the condition is more likely than not permanent. While I agree with the deputy commissioner's finding that claimant sustained a mental health sequela caused by the stipulated right shoulder injury, I do not find claimant proved his mental health condition has resulted in permanent impairment.

II. Functional Loss for the Right Shoulder Injury and Left Shoulder Sequela Injury

The deputy commissioner found claimant sustained 12 percent permanent functional loss of his right shoulder, which entitles him to receive 48 weeks of PPD benefits under Iowa Code section 85.34(2)(n), and the deputy commissioner found claimant sustained three percent permanent functional loss of his left shoulder, which

entitles him to receive 12 weeks of PPD benefits under Iowa Code section 85.34(2)(n). Defendants assert the deputy commissioner erred in finding claimant sustained a permanent left shoulder sequela injury and in finding claimant should be awarded any impairment for the distal clavicle excision. Claimant asserts the decision should be affirmed in that regard. As discussed above, I affirm the deputy commissioner's finding claimant sustained a permanent sequela injury of his left shoulder caused by the stipulated right shoulder injury, but with the following substituted analysis I modify and reverse the deputy commissioner's award of PPD benefits.

The deputy commissioner found claimant is entitled to compensation based on 400 weeks for each shoulder. In Carmer v. Nordstrom, Inc., File No. 1656062.01, 2021 WL 6206792 (Iowa Workers' Comp. Com'm Dec. 29, 2021), I found the claimant's injury to her right and left shoulder caused by a single accident should be compensated as an unscheduled injury to the body as a whole, in relation to 500 weeks of benefits, pursuant to Iowa Code section 85.34(2)(v). Based on Carmer, I reverse the deputy commissioner's finding in this matter that claimant's impairment should be evaluated using 400 weeks for each shoulder.

The parties agree following the work injury claimant returned to work earning the same or greater wages. Iowa Code § 85.34(2)(v), provides the following, in part,

[i]f an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensation based only upon the employee's functional impairment rating resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement of benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Under the plain meaning of the statute, claimant is only entitled to compensation for his functional loss because he returned to work for the defendant.

Two physicians provided permanent impairment ratings regarding claimant's right shoulder injury in this case, Timothy Vinyard, M.D., a treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician who performed two IMEs in this matter for claimant. Both physicians opined claimant reached maximum medical improvement (MMI) as of October 24, 2019. (Ex. 2, p. 44; JE 7, pp. 208-209)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Vinyard assigned claimant a one percent permanent impairment rating. (JE 7, p. 210) Dr. Vinyard did not provide his range of motion findings with his impairment rating. (JE 7, p. 210) For this reason, I do not find his opinion persuasive.

Following Dr. Bansal's examination, he assigned claimant one percent upper extremity impairment for loss of flexion and one percent upper extremity impairment for loss of internal rotation. (Ex. 2, p. 45) Dr. Bansal provided his range of motion findings in his impairment rating. (Ex. 2, p. 45) Dr. Bansal also assigned claimant ten percent impairment for his distal clavicle excision, for a combined 12 percent impairment of the right upper extremity, or seven percent impairment of the body as a whole. (Ex. 2, p. 45)

After receiving Dr. Bansal's opinion, Dr. Vinyard opined claimant should not be assigned any impairment for the distal clavicle excision he performed. (JE 7, p. 218) Defendants also retained Ian Crabb, M.D., an orthopedic surgeon, to conduct an IME. (Ex. B) Dr. Crabb estimated claimant's right upper extremity impairment to be two percent based on loss of abduction. (Ex. B, pp. 18-19) Dr. Crabb agreed with Dr. Vinyard that no impairment should be assigned for the distal clavicle excision performed by Dr. Vinyard. (Ex. B; p. 19) Dr. Bansal provided a response opinion, stating the AMA Guides direct the examiner to assign an impairment rating for a distal clavicle excision. (Ex. 2, p. 58)

Table 16-27 of the AMA Guides governs impairment of the upper extremities after arthroplasty of specific bones and joints. Under Table 16-27, a distal clavicle excision is assigned ten percent impairment.

Page 498 of the AMA Guides directs the examining physician as follows:

Conditions not previously described that can contribute to the impairments of the hand and upper extremity include bone and joint disorders (Section 16.7a), presence of resection or implant arthroplasty (Section 16.7b), musculoskeletal disorders (Section 16.7c) and tendinitis (Section 16.7d), and loss of strength (Section 16.8). The severity of the impairment due to these disorders is rated separately according to Tables 16-19 through 16-30 and then multiplied by the relative maximum value of the unit involved as specified in Table 16-18. . . .

Under Table 16-18, the appropriate multiplier for the acromioclavicular joint is 25 percent.

Claimant underwent a distal clavicle excision. The AMA Guides direct the physician to assign a rating for a distal clavicle excision, contrary to the opinions of Drs. Crabb and Vineyard. For this reason, I do not find their opinions persuasive.

The AMA Guides also require application of a 25 percent multiplier. This results in a 2.5 percent impairment for a distal clavicle excision under the plain text of the AMA

Guides. Dr. Bansal did not follow the plain text of the AMA Guides and he failed to apply the 25 percent multiplier. I find claimant sustained two percent permanent impairment for loss of range of motion and an additional 2.5 percent impairment for the distal clavicle excision. Using the Combined Values Chart at page 604 of the AMA Guides, claimant has sustained four percent permanent impairment to his right upper extremity, which converts to two percent whole person impairment under Table 16-3 of the AMA Guides.

I found the deputy commissioner properly found claimant sustained a permanent sequela injury of his left shoulder caused by the stipulated right shoulder injury. Dr. Bansal is the only physician who provided an impairment rating for claimant's left shoulder injury. Dr. Bansal assigned claimant three percent upper extremity impairment based on loss of external rotation, extension, and internal rotation, which he converted to two percent whole person impairment. (Ex. 2, pp. 54-55) Combining the injuries to Claimant's right and left shoulders, I find claimant has sustained five percent whole person impairment, entitling claimant to receive 25 weeks of PPD benefits.

The deputy commissioner found the commencement date for permanent partial disability benefits is December 19, 2019. The parties agree this is not the proper commencement date. Under the statute, "[c]ompensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined" using the AMA Guides. Iowa Code § 85.34(2). Dr. Vinyard found claimant reached MMI on October 24, 2019, and opined claimant sustained one percent permanent impairment as of October 30, 2019. Under the express terms of the statute, I find the commencement date for PPD benefits is October 30, 2019, the date when Dr. Vinyard determined claimant's percentage of permanent impairment. I find claimant is entitled to receive 25 weeks of permanent partial disability benefits, commencing on October 30, 2019.

III. Independent Medical Examination and Costs

Defendants assert the deputy commissioner erred in finding defendants should reimburse claimant for the cost Dr. Bansal's first IME, \$1,293.00 for Dr. Ressler's evaluation, and additional costs totaling \$2,690.50. The deputy commissioner did not discuss or itemize the additional costs totaling \$2,690.50.

The deputy commissioner found claimant is entitled to reimbursement from defendants in the amount of \$2,672.00 for the cost of Dr. Bansal's first IME. Iowa Code section 85.39(2) (2018), provides, in pertinent part:

2. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably

necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

In compliance with section 85.39, Dr. Bansal conducted his first IME after Dr. Vinyard, the authorized treating orthopedic surgeon, provided his October 30, 2019, impairment rating. Therefore, I affirm the deputy commissioner's finding that pursuant to section 85.39, claimant is entitled to reimbursement from defendants in the amount of \$2,672.00 for the cost of Dr. Bansal's first IME. Section 85.39 allows an injured worker to recover the cost of only one IME.

With regard to the other costs for which claimant requested reimbursement, Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes.

According to Exhibit 8, claimant seeks to recover the \$103.00 filing fee, \$13.50 for service on defendants, \$1,293.00 for Dr. Ressler's evaluation, \$1,783.00 for Dr. Bansal's second IME, \$1,250.00 for Daryl Short's first functional capacity evaluation (FCE) and \$900 for Mr. Short's second FCE. The rule allows for the recovery of the filing fee and service fees. The rule also allows for the recovery of two reports. The bills from Dr. Ressler, Dr. Bansal, and Mr. Short are itemized, so it is possible to determine how much they charged for their reports. Dr. Ressler charged \$480.00 for her report. (Ex. 8, p. 124) Dr. Bansal charged \$1,324.00 for the report for the second IME. (Ex. 8, p. 126) Mr. Short charged \$350.00 for the report for his first FCE, and \$350.00 for the report for his second FCE. (Ex. 8, pp. 116, 128) Under the express wording of the rule, claimant is entitled to recover the cost of only two reports, not three. I find claimant is entitled to recover \$480.00 for the cost of Dr. Ressler's report, and \$1,324.00 for the cost of Dr. Bansal's report for his second IME. I find claimant is not entitled to recover the cost of either report prepared by Mr. Short.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 24, 2022, is affirmed in part, modified in part, and reversed in part with the above-stated additional and substituted analysis.

Defendants shall pay claimant 25 weeks of permanent partial disability benefits at the weekly rate of six hundred twenty-six and 67/100 (\$626.67), commencing on October 30, 2019.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of two thousand six hundred seventy-two and 00/100 (\$2,672.00) for the cost of Dr. Bansal's first IME.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of one thousand nine hundred twenty and 50/100 dollars (\$1,920.50), and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 20th day of September, 2022.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Byrne (via WCES)

Michael J. Miller (via WCES)

Andrew Workman (via WCES)